In The

Supreme Court of the United States

October Term, 1971

No. 70-188

PECOLA ANNETTE WRIGHT, ET AL.,
Petitioners,

v.

COUNCIL OF THE CITY OF EMPORIA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

D. DORTCH WARRINER
Warriner, Outten, Barrett & Burr
314 South Main Street
Emporia, Virginia 23847

JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
1200 Ross Building
Post Office Box 1122
Richmond, Virginia 23208

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

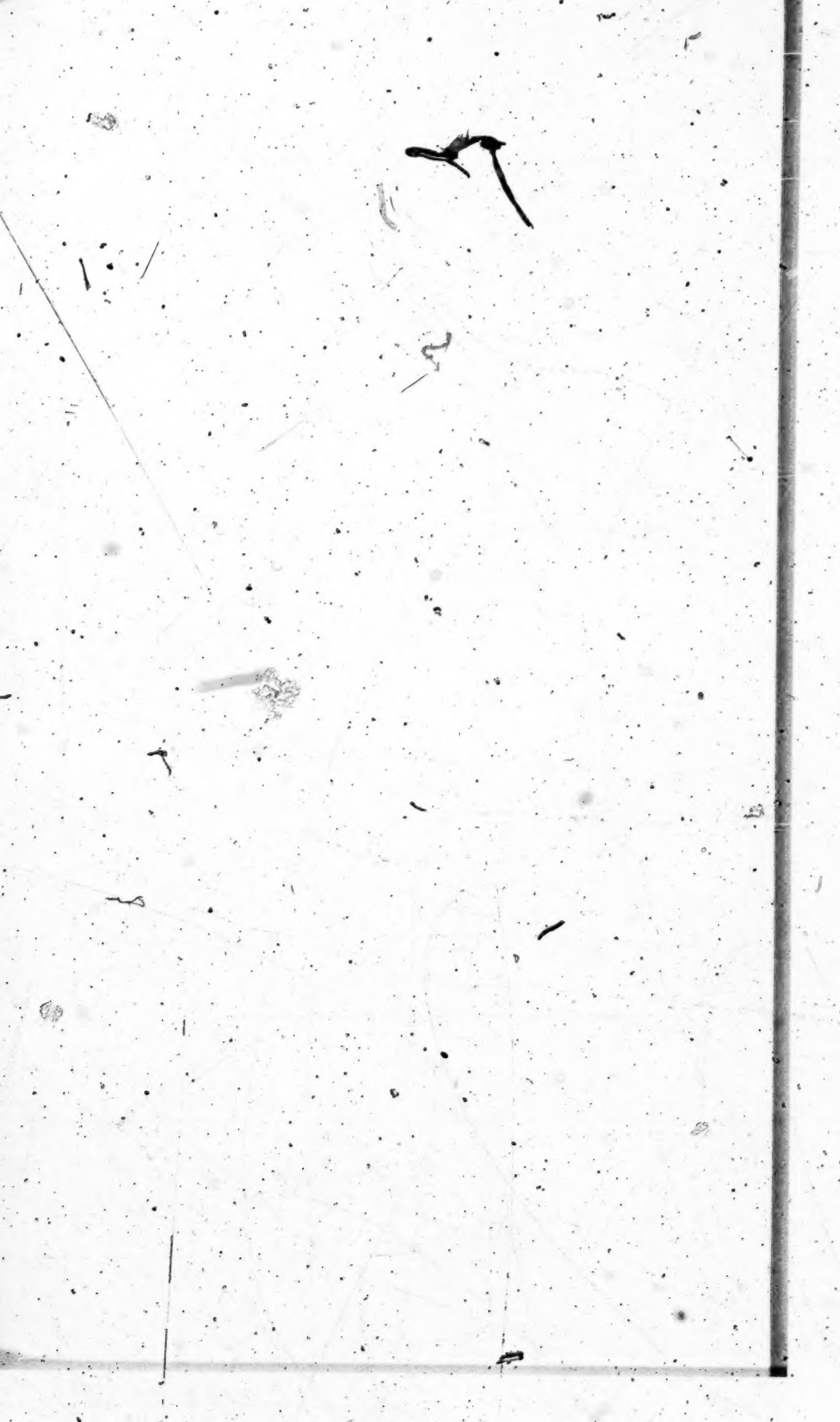

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitution

Codes

Acts

Other Authorities

In The

Supreme Court of the United States

October Term, 1971

No. 70-188

PECOLA ANNETTE WRIGHT, ET AL.,
Petitioners,

v.

COUNCIL OF THE CITY OF EMPORIA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Respondents believe that the question presented is:

> Was the Court of Appeals correct in deciding that the constitutionally protected rights of petitioners would not be violated if the City of Emporia, an independent political subdivision of the Commonwealth of Virginia, operates a unitary school system separate from that of the County of Greensville.

Petitioners' statement of the question presented (PB 2[1])

[1] The following designations will be used in this brief:
PB—Petitioners' brief
RA—Appendix to this brief of respondents
SA—Appendix to petitioners' supplemental brief in support of petition for writ of certiorari

is misleading, inaccurate and not clear. It is misleading in that it ignores that the City of Emporia is an independent political subdivision for all governmental purposes—it is not just a school district.

It is inaccurate in stating that "the changed boundaries result in less desegregation" for two reasons. First, no boundaries have been changed, as such—rather, a "town" became a "city" under long-standing state transition statutes and no boundaries were changed. Second, operation of a separate school system by the City would not result in "less desegregation" in either the County or the City.

It is not clear what petitioners mean in stating that "formerly the absence of such boundaries was instrumental in promotion segregation."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Va. Const. Art. IX, § 133, which was in effect until July 1, 1971, is set forth at RA 1, and Va. Const., Art. VIII, § 5(a) and § 7, which became effective July 1, 1971, are set forth at RA 2.

2. Va. Code Ann. §§ 15.1-978 through 15.1-1010 (1950), which relate to the transition of towns to cities in the Commonwealth of Virginia. Va. Code Ann. § 15.1-982 (1950), as in effect on July 31, 1967, is set forth in part at RA 2.

3. Va. Code Ann. § 22-93, is set forth at RA 3 and § 22-97, is set forth at RA 3, *et seq.*

4. The following sections of the Virginia Code, which are set forth in the appendix to petitioners' brief, were amended, effective July 1, 1971, and are set forth, as amended at RA 2, 3, 7 respectively: §§ 22-30, 22-43, 22-100.1 and 22-100.3.

5. Va. Code Ann. §§ 22-34 and 22-100.2, set forth in the appendix to petitioners' brief, were repealed effective July 1, 1971.

STATEMENT

Transition of Emporia from Town to City

On September 1, 1969, Greensville County had a public school population of 2,616 children of whom 728 were white and 1,888 were Negro. On the same date, the City of Emporia had a public school population of 1,123 of whom 543 were white and 580 were Negro (304a).[2] Four school buildings—three elementary and one high—are physically located in Greensville County. Three school buildings—two elementary and one high—are physically located in the City (294a).

Prior to July 31, 1967, Emporia was an incorporated town and, as such, was a part of Greensville County, Virginia. On July 31, 1967, the Town of Emporia became an independent city of the second class pursuant to the provisions of the Code of Virginia.[3] The evidence is uncontradicted that the motivating factor behind the transition was the desire of Emporia's elected officials to have Emporia receive the benefits of the state sales tax that had been recently enacted and to eliminate other economic inequities (123a, 124a). There has been no charge by petitioners that the decision to become a city was in any way motivated by the school desegregation situation. There has been no finding by the District Court to impugn the motives or purposes of the City in effecting this transition.

The Court of Appeals pointed out:

---

[2] References are to the Single Appendix filed herein.
[3] Va. Code Ann. § 15.1-982 (RA 2)

At the time city status was attained Greensville County was operating public schools under a freedom of choice plan approved by the district court, and *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), invalidating freedom of choice unless it "worked," could not have been anticipated by Emporia, and indeed, was not envisioned by this court. *Bowman* v. *County School Board of Charles City County*, 382 F. 2d 326 (4th Cir. 1967). The record does not suggest that Emporia chose to become a city in order to prevent or diminish integration. Instead, the motivation appears to have been an unfair allocation of tax revenues by county officials (314a).

The Contract With Greensville County

On April 10, 1968, the City and County entered into an agreement pursuant to which the County was to provide specified services, including schools, for the people of Emporia for a period of four years (32a). It provided for earlier termination under certain circumstances. As evidenced by minutes of the County Board of Supervisors, this contract was entered into by the City under the threat of expulsion by the County of the City children from the County schools at mid-term (31a). The District Court stated:

> Only when served with an "ultimatum" in March of 1968, to the effect that city students would be denied access to county schools unless the city and county came to some agreement, was the contract of April 10, 1968, entered into (305a).

Further, the contract was entered into only after the City School Board had fully explored the feasibility of operating its own system immediately upon transition and after negotiations toward establishing a joint school system with the County had failed (227a, et seq.). As found by the District Court:

Ever since Emporia became a city, consideration has been given to the establishment of a separate city system (305a).

The City School Board determined that for practical reasons it was impossible to establish its own system at that time (227a).

The District Court also found that the City's second choice "was some form of joint operating arrangement with the county, but this the county would not assent to". (305a). The minutes of the County Board of Supervisors make this clear (30a).

Petitioners state that instead of filing suit against the County to establish the City's equity in the school property in 1967, the City "negotiated for preferred contractual terms (see 230a)" (PB 5). It is obvious that had the City chosen to file suit at that time the County would have refused to permit City students to attend the County schools during the pendency of that suit. Therefore, as a practical matter, that choice was not available to the City. Further, the record is clear that "preferred contractual terms" were not obtained by the City—on the contrary, the County's terms were forced upon the City (230a-233a).

The contract of April 10, 1968 terminated after the 1970-71 school year as the District Court recognized it would (296a). Were it not for this proceeding, the City of Emporia would be free to operate its own system during the current school year. Actually, it would be obligated so to do under the law of the Commonwealth of Virginia.

Emporia's Decision to Operate Own School System

During the 1968-69 school year, the County operated under a freedom-of-choice plan which had been approved by the District Court. On June 25, 1969, the District Court

enjoined the County to disestablish the existing dual school system and to replace it with a racially unitary system. Subsequently, a plan was approved which required the assignment of all pupils in the system as follows (295a):

School	*Grades*
Greensville County High	10, 11, 12
Junior High (Wyatt)	8, 9
Zion Elementary	7
Belfield Elementary	5, 6
Moton Elementary (now Hicksford)	4, 5
Emporia Elementary	1, 2, 3
Greensville County Training	Special Education

Under this plan, an Emporia child who begins in the first grade of the Greensville system is required to attend six different schools—possibly seven—during the course of his elementary and secondary education. In grades 1-3 and in grades 10-12, he would attend schools located in the City; in the remaining grades, he would be required to go outside the City of his residence to attend schools located in the County.

After the order of June 25, 1969 was entered by the District Court, the bi-racial (125a) City School Board determined to operate its own schools for 1969-70. It planned a racially unitary system in which all elementary school children—black and white—would be assigned to one school and all high school children—black and white—would be assigned to another school (129a). The City system would have been approximately 52% black and 48% white. The County system would then have been approximately 72% black and 28% white. The combined system is approximately 66% black and 34% white (304a, 316a).

Petitioners repeatedly refer to the fact that it was the "desegregation" decree of June 25, 1969 that caused the

City to decide to operate its own system (e.g. PB 8, 9, 11, 13). They argue that the separate system "was conceived in response to, and represents a determined effort to evade, the desegregation decree of the district court" (PB 48); that the timing of the city's decision "strongly suggests racial motivation" (PB 52); and that "the claims of the city to a continuing and long-standing desire to free itself from county domination which prevented attainment of educational quality, are far outweighed by its unexplained failure to take any action until integration was to occur, [and] its awareness that a separate system would contain a more palatable racial mix which might prevent white flight * * *" (PB 54).[4]

Throughout their brief, petitioners attempt to convey the impression that the City was satisfied with the system being operated by the County until the "pairing plan" required by the Order of June 25, 1969 was put into effect (e.g. PB 5, 13). The record is clear that while the City was satisfied with the assignment plan in effect prior to that order (freedom of choice), it was not satisfied with the con-

[4] Petitioners state on pages 8 and 9 of their brief that the City offered to accept county students into the city system on a tuition basis. They neglect to state that the City included in the assignment plan it submitted to the Court in December 1969 a provision that no students would be accepted from outside the City until approval was obtained from the District Court (224a, 225a). This action was taken after the hearing on the preliminary injunction in August 1969 when the District Court expressed some concern about the City's plan to accept in its system students residing in the County on a tuition, no transportation basis. While the City intended to accept such students on a "first come, first served" basis without regard to race, it recognized that this plan had apparently cast doubt upon the good faith intention of the City to operate a unitary system composed of approximately an equal number of white and Negro students. Therefore, while it believed such doubt to be unjustified, it decided to affirmatively incorporate in its plan that it would accept no students from another school district without first obtaining approval of the District Court (225a). The District Court so found (296a).

tractual arrangement under which it had no control over the system nor was it satisfied with the system itself.[5]

The District Court accurately stated Emporia's principal reason for its decision to operate its own system to be:

> Emporia's position, reduced to its utmost simplicity, was to the effect that the city leaders had come to the conclusion that the county officials, and in particular the board of supervisors, lacked the inclination to make the court-ordered unitary plan work. The city's evidence was to the effect that increased transportation expenditures would have to be made under the existing plan, and other additional costs would have to be incurred in order to preserve quality in the unitary system. The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds (305a, 306a).

The testimony of the Chairman of the City School Board with respect to the reasons for which the City decided to operate its own schools is found on pages 236a through 242a of the appendix. In summary, the reasons behind the decision were that, in the opinion of the City, the County was not able to operate a unitary school system successfully, that the County would not be willing to expend the necessary funds to make a success of a unitary school system, that the City was willing to do so, that a successful public school system was a necessary part of the future well being of the

---

[5] In support of their claim that the City was satisfied with the County system, petitioners refer the Court to pages 163a and 235a. At page 163a, Mr. Lee, the mayor of the City testified:

"We have never been happy with the system. . . ."

At page 235a, Mr. Lankford, chairman of the City School Board testified that he thought the County had operated a reasonably effective system but that the City did not plan to renew the contract.

At page 147a, Mr. Lankford testified:

"I personally, and I think my School Board since we were formed two years ago, have never been happy [with the County system]."

community, and that Emporia must control its own system in order to accomplish these ends.[6]

Additionally, that the frequent transfers from building to building required under the plan was a source of primary concern is illustrated by the following colloquy between the District Judge and the Chairman of the City School Board:

> The Court: What you are really saying, Mr. Lankford, everybody has been at you, the Council (sic) and myself and I don't mean to, but I want to get it straight. What you are really saying is that the reason that precipitated this, and the primary reason, is the fact that your children and all the children have got to transfer schools more frequently than they have in the past and you consider that to be bad?
>
> The Witness: I consider that to be bad, yes, sir, and the—
>
> The Court: I am certainly in accord with you that it is not the best thing, but that is really the reason, is it not?
>
> The Witness: That is the basic reason that we wish to operate our city school (152a, 153a).

The Mayor of the City testified that the order of the District Court did cause the City "to try and act with haste" (121a). However, the concern of the City was that its children would attend six different schools from the first grade through high school, that the City was paying more than its

---

[6] At the time of the hearings in the District Court on August 8, 1969 and December 18, 1969, the contract of April 10, 1968 was in effect. The evidence was that the County completely controlled the operation of that system and that the City had no control over the school budget, over the selection of the school board, over the curriculum, over the hiring of teachers, over the salaries to be paid to teachers, or over any other matter relating to the operation of the schools (158a, 159a, 242a). At the present time, the contract now having terminated, the situation is the same.

fair share of the cost of the County School System which cost would be increased by the increased transportation required, that such money could be applied to provide a better school program for city children—black and white—if all its elementary students were educated in one school and all its high school children were educated in another school (121a, 122a).

Therefore, it is true—and freely conceded—that the assignment plan which was ordered by the District Court on June 25, 1969 precipitated the decision of the City to accelerate the time it would operate its own system. However, it is equally true—and here emphasized—that it was not the *integration* aspects of the plan that precipitated the decision.[7]

Quality of Unitary System to be Operated by Emporia Superior to that of County

On August 1, 1969, the petitioners filed a supplemental complaint in, and added the School Board and Council of the City of Emporia as parties defendant to, the action pending in the District Court. Until that time, the action was an "ordinary" desegregation suit to which the County school authorities were the only parties defendant. By the supplemental complaint petitioners sought to enjoin the City from operating its own school system and on August 8, 1969, the

---

[7] The Chairman of the City School Board testified:

Q. Now, at the present time I believe you testified that the ratio is approximately 60-40 in the county? A. Yes, sir, to my knowledge that is about right.

Q. And if the city formed the city school system your testimony is it would be approximately 50-50? A. Approximately.

Q. In the city? A. Yes, sir.

Q. Is this a matter of great moment to the City of Emporia? A. No, sir.

Q. Is that the motivating influence of the City of [Emporia]. A. No, sir (152a).

District Court entered an order temporarily enjoining the City from so doing (195a). The City decided not to appeal the order granting the temporary injunction but rather to follow the course of presenting the City's case in an orderly manner to the District Court at a hearing on whether the injunction should be made permanent (186a, 187a). The earliest date that the District Court could assign for such a hearing was December 18, 1969 (188a).

The City then proceeded to prepare itself to be in a position to put its system in effect just as soon as it was permitted to do so. It employed Dr. H. I. Willett, who had been superintendent of the Richmond, Virginia, public school system for 22 years and who was then associated with Virginia Commonwealth University, to design a budget specially tailored to meet the needs and problems of the unitary system which Emporia proposed to operate (252a, 259a, 261a, 262a).[8] Dr. Willett's budget, which was adopted by the City School Board and the City Council (200a, 287a), is included in the Appendix beginning at page 202a. The budget message is particularly significant (206a-215a).

The City also employed Dr. Neil H. Tracey, Professor of Education at the University of North Carolina,[9] to evaluate the present system as it was being operated by the County of Greensville, to compare it with the system proposed by the

---

[8] On at least two occasions in their brief (PB 19, 50), petitioners refer to the fact that the proposed budget was not prepared until after the temporary injunction had been entered "and the City had gained a better idea what evidence might best serve its cause" (PB 50). Obviously, a budget would not have been prepared by the City prior to its decision to operate its own system and that decision was not made until a short time before the temporary injunction was entered.

[9] Dr. Tracey was erroneously referred to in the opinion of the District Court as being from Columbia University and in the transcript of the proceedings of December 18, 1969 (266a, et seq.) as being from the University of New York.

City of Emporia, and to testify at the hearing on whether the injunction against the City should be made permanent.[10] At that hearing on December 18, 1969, Dr. Tracey testified that the assignment plan ordered by the District Court for Greensville County has an adverse effect from an educational standpoint (272a-274a). In summary, Dr. Tracey's conclusions were based on the following factors:

1. Funds which could otherwise be applied to educational purposes must be applied to the expenses of providing transportation (274a).

2. Time that is required to transport the pupils serves no useful educational purpose (274a).

3. Educational resources including teachers, text materials, library materials and other instructional materials must be divided among the buildings in which the various grades are taught. With respect to the elementary grades, this results in curtailing the resources available to the pupils housed in each building. Since most children have an achievement range of about double the number of years of their grade designation, the curtailment of the educational resources results in the curtailment of the range of instructional and in-

---

[10] On page 19 of their brief, petitioners state that Dr. Tracey "testified that it was his 'understanding' that he was not serving the City in 'any attempt to resegregate or to avoid desegregation' (269a)." Dr. Tracey's testimony on this point was: [questions by Mr. Kay].

> Q. Now, sir, at the time that you were approached to accept this assignment, did you place any conditions on your acceptance? And if so, what were they? A. Yes, I placed this basic condition on acceptance of any such assignment, that the intent of the people involved, the Emporia people in this instance, should be specifically not related to any attempt to resegregate or to avoid desegregation or to avoid integration.
>
> Q. And, if you had ascertained that this was the intent, what was your understanding with the City? A. My understanding was that I would not serve in this capacity, at all (269a).

dependent educational opportunities available to the pupils (272a, 273a).

Furthermore, Dr. Tracey testified that the effect of historic segregation of the races is not eliminated purely by a proportionate mixing of the races. In his opinion, special educational opportunities must be afforded to solve these problems (269, 270a). Dr. Tracey testified that an examination of the Greensville County System indicated that the extra effort required to provide these opportunities was not being made (271a, 272a, 274a). On the other hand, an examination of the system proposed by Dr. Willett, which had been adopted to the extent possible by the City, indicated that it would make the necessary effort (275a, et seq.). In this connection, Dr. Tracey studied the budget message and budget (275a) prepared for the City School Board by Dr. H. I. Willett.

Petitioners state that Dr. Tracey compared the educational programs of the County with those proposed by the City "without reference to the racial composition of the two systems" (PB 19). In support of that statement, they quote fragments of answers of Dr. Tracey to two different questions (PB 20). Neither the questions nor the answers cited by petitioners support the conclusion that Dr. Tracey's comparisons were made "without reference to the racial composition" of the systems (269a, 270a). Dr. Tracey's entire testimony was directed to the point that special educational effort must be exerted to eliminate the effects of segregation (270a)[11]

[11] On direct examination, Dr. Tracey testified:

Q. Is a special effort required by locality and school officials to provide such a system, in your opinion?

A. Yes, special effort. There are two kinds of high level support and a particular orientation on the part of the public and the school officials to meet each child in this way (271a).

Dr. Tracey went on to testify why the County was not providing this support and why the proposed program of the City would.

and to his study of the existing and proposed systems to ascertain which was more likely to provide that effort. In his study, Dr. Tracey examined "the organizational pattern and effects on that organizational pattern of the separate or possible separate school systems for Emporia" (269a). Such study necessarily involved a consideration of the racial composition of the two systems. Dr. Tracey did testify that "no particular pattern of mixing has in and of itself, has any desirable effect" (270a). He also testified that he knew of no study that would indicate whether an increase in the ratio of Negro to white children from 60-40 to 70-30 would have any effect on the educational process (281a).

In summary, the City has committed itself to assign all elementary pupils in the City to one school building and all high school pupils to one school building; to assign faculty on a completely integrated basis; to rename the former Emporia Elementary School the R. R. Moton Elementary School; to accept no students from other school divisions or districts until approval is obtained from the District Court (224a, 225a).[12] Further, it has committed itself insofar as

[12] The following resolution was adopted by the City School Board and filed as the plan under which it proposed to operate if permitted to do so (Ex E-F, Hearing of December 18, 1969, 224a):

Mr. Lankford introduced the following Resolution, which after considerable discussion by the Board, was unanimously adopted:

> If permitted by the United States District Court to operate its own school system, the School Board of the City of Emporia will do so according to the following plan:
>
> 1. Assignment of pupils and faculty shall be made on a completely racially integrated basis resulting in a racially unitary system. All pupils of the same grade in the system shall be assigned to the same school, with the possible exception of those pupils assigned to a special education program which program will be conducted on a racially integrated basis. It is contemplated that all grades, kindergarten through the sixth grade, shall be located and conducted in one building (the former Emporia Elementary School to be renamed R. R. Moton Elementary School) and all grades, seventh through twelfth, shall be located

possible to operate a quality system designed to meet the problems that naturally occur in the transition from a basically segregated system to a massively integrated one.

The City system would contain 580 Negro children and 543 white children—a ratio of 52% Negro to 48% white. The County system would contain 1,888 Negro children and 728 white children—a ratio of 72% Negro to 28% white. The combined systems contained 2,477 Negro children and 1,282 white children—a ratio of 66% Negro to 34% white (304a).

Petitioners introduced no evidence in this case indicating any dissatisfaction on their part with the City's plan to operate its unitary school system.[13]

Its evidence at the hearing on August 8, 1969 upon the motion for a temporary injunction was restricted to testimony from the superintendent of schools, the mayor of the City, and the chairman of the City School Board together with exhibits introduced through those witnesses. At the hearing on December 18, 1969 to determine whether the injunction should be made permanent, it was stipulated that the evidence introduced at the August hearing could be considered

---

and conducted in one building (the former Greensville County High School to be renamed Emporia High School).

2. The schools will sponsor and support a full range of extracurricular activities and all activities conducted by or in the public school system will be on a racially integrated basis.

3. Any bus transportation that is provided will be on a racially integrated basis.

4. No students will be accepted from other school divisions or districts until approval is first obtained from the United States District Court.

[13] The record does not disclose the residence of the petitioners at the times pertinent to the issues here involved—thus, it is not known whether they all resided in the County, whether they all resided in the City, or whether some resided in City and some in the County.

as received in the December hearing (Transcript of proceedings; 12/18/69, p. 3). Petitioners introduced no additional evidence.

Decision of the District Court

On page 17 of their brief, petitioners quote at length from the opinion of the District Court delivered from the bench on August 8, 1969 at the hearing on the temporary injunction.

There can be no doubt that the District Court's impression of this case at the time of that hearing changed drastically after hearing the evidence presented by the City on December 18, 1969. During the hearing on December 18, the District Judge stated:

> I think the matter now is in a different posture and less difficult in the calmness of December than it was (240a).
>
> * * *
>
> * * * [A]s I said before, this is a much—a more different situation than it was in August (248a).

Therefore, it is the findings made by the District Court after the evidence was fully developed that are controlling. Certainly, they supercede any conflicting findings made after the expedited and peremptory hearing on the temporary injunction. It is to the later findings we now turn.

(a) PROPOSED SYSTEM

With respect to the system Emporia desires to operate, the District Court found:

> The city clearly contemplates a superior quality educational program. It is anticipated that the cost will be such as to require higher tax payments by city residents.

A kindergarten program, ungraded primary levels, health services, adult education, and a low pupil-teacher ratio are included in the plan, defendants' Ex. E-G at 7, 8 (297a).

* * *

The Court does find as a fact that the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of any court-ordered plan (306a).

* * *

This Court is satisfied that the city, if permitted, will operate its own system on a unitary basis (307a).

(b) Reasons for Emporia's Decision

With respect to the reasons behind the desire of Emporia to operate its own system, the District Court found:

The motives of the city officials are, of course, mixed. Ever since Emporia became a city consideration has been given to the establishment of a separate city system (305a).

* * *

Emporia's position, reduced to its utmost simplicity, was to the effect that the city leaders had come to the conclusion that the county officials, and in particular the board of supervisors, lacked the inclination to make the court-ordered unitary plan work. The city's evidence was to the effect that increased transportation expenditures would have to be made under the existing plan, and other additional costs would have to be incurred in order to preserve quality in the unitary system. The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds (305a, 306a).

* * *

The Court finds that, in a sense, race was a factor in the city's decision to secede (307a).

It is significant that while the District Court found the motives of the city officials to be mixed and that, in a sense, race was a factor, it did not find that the reasons of the City were related to obtaining "a more palatable racial mix" (PB 54).

(c) Effect on County

With respect to the effect of the establishment by Emporia of a separate system, the District Court found:

> The establishment of separate systems would plainly cause a substantial shift in the racial balance. The two schools in the city, formerly all-white schools, would have about a 50-50 racial makeup, while the formerly all-Negro schools located in the county which, under the city's plan, would constitute the county system, would overall have about three Negro students to each white [footnote omitted] (304a).
>
> * * *
>
> Moreover, the division of the existing system would cut off county pupils from exposure to a somewhat more urban society (306a).
>
> * * *
>
> While the city has represented to the Court that in the operation of any separate school system they would not seek to hire members of the teaching staff now teaching in the county schools, the Court does find as a fact that many of the system's school teachers live within the geographical boundaries of the city of Emporia. Any separate school system would undoubtedly have some effect on the teaching staffs of the present system (307a).

In sum, the District Court was primarily concerned with the shift in racial balance that would result if Emporia estab-

lished its own system. Secondarily, it commented upon the county pupils' exposure to a somewhat more urban society[14] and an unspecified effect on the teaching staffs. It was upon those factors alone that the District Court prohibited the City from exercising the powers and fulfilling the duties imposed upon it by the law of Virginia.

In concluding its opinion, the District Court clearly indicated that it considered any possible adverse effects resulting from separation to be purely speculative:

> But this [fact that Emporia's system will be unitary] does not exclude the *possibility* that the act of division itself *might* have foreseeable consequences that this Court ought not to permit (emphasis supplied) (307a).
>
> * * *
>
> This Court is most concerned about the *possible* adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs (emphasis supplied) (308a).

Having decided to prohibit Emporia from establishing its system for the reasons recited above, the District Court added:

> If Emporia desires to operate a quality school system for city students, it may still be able to do so if it presents a plan not having such an impact upon the rest of the area now under order. * * * Perhaps, too, a separate system might be devised which does not so prejudice the prospects for unitary schools for county as well as city residents. This Court is not without the

[14] According to the 1970 census, Emporia had a population of 5300. U.S. Dept. of Commerce Bureau of Census, *1970 Census of Population, General Population Characteristics PC (1)—B 48 Virginia* (October 1971). According to the mayor of Emporia, the wealth of the area is located in the County and not the City (291a). Thus, the benefits of being exposed to the "urban society" of Emporia would appear somewhat limited, at best.

power to modify the outstanding decree, for good cause shown, if its prospective application seems inequitable (309a).

If the unitary plan proposed by the City does not satisfy the test of equity, it is difficult to envision how it could be modified in a manner which would permit the City to accept the invitation of the District Court.

Decision of the Court of Appeals

The Court of Appeals reversed the District Court and instructed that the injunction against the City be dissolved. Its decision was based entirely upon the factual findings of the District Court. In summary, the Court of Appeals held:

(a) The power of state government to determine the geographic boundaries of school districts is ordinarily plenary (311a, 312a).

(b) Such power is limited when the exercise thereof is for the purpose of perpetuating invidious discrimination (312a).

(c) If the effect of the boundary determination is resegregation, a discriminatory purpose will be inferred (312a).

(d) If the effect of the boundary determination is only a modification of the previous racial ratio, then further inquiry into the purpose of that change must be made (313a).

(e) Relying only upon the findings of fact made by the District Court, the Court of Appeals held that neither the effect nor the purpose of the boundary determination was in violation of the constitutional rights of petitioners (316a).

The decision of the Court of Appeals will be more fully discussed subsequently.

However, attention is now called to the fact that petitioners throughout their brief refer to the Court of Appeals as having given consideration to the *motive* of the City officials in deciding to establish a separate school system (PB 26, 29, 37, 40, 45, 46). Whether by accident or design, petitioners inaccurately portray that the Court of Appeals tested the constitutionality of Emporia's action by determining the "primary motive" (313a, 316a, 318a) of the local officials. Of course, it was the "purpose" of the action, rather than the "motive" behind that action, that was considered by the Court of Appeals and this is clearly stated in the opinion. Petitioners attempt to negate the distinction between purpose and motive by a footnote on page 38 of their brief.

Petitioners quote at length from Judge Sobeloff's dissenting opinion in *United States* v. *Scotland Neck City Board of Education*, 442 F.2d 575 (4th Cir. 1971), stating that it was a companion case to the instant one (PB 27, 28). Though the cases were decided at the same time, the *Scotland Neck* case is not truly a companion to the *Emporia* case. They were tried by different district courts and involve substantially different facts.[15]

SUMMARY OF ARGUMENT

I

Under the law of Virginia counties and cities now are and historically have been independent of each other politically, governmentally and geographically. Each has the separate

[15] Judge Sobeloff did not participate nor vote in the *Emporia* case. If any significance can be attached to his views so far as this case is concerned, then it should be noted that Judge Butzner, who likewise did not participate in it, was a part of the majority in the *United States* v. *Scotland Neck City Bd. of Educ.*, and must, therefore, be assumed to be in accord with the principles set forth by the majority in the *Emporia* case.

and independent right and duty to operate and maintain its own school system. Emporia became a city on July 31, 1967 pursuant to a law that has existed since at least 1892 and, at that time, became obligated to maintain its own school system.

II

The proposed action of the City to operate and maintain an independent school system will not violate any of the constitutional rights of petitioners as those rights have been defined by the most recent decisions of this Court. The constitutional rights of petitioners, which in this case are grounded upon the equal protection clause of the Fourteenth Amendment, require that they be permitted to attend a unitary, non-racial system of public education. The corresponding duty of the local school authorities is to provide such a system. Petitioners are not entitled to demand, and local school authorities are not required to provide, any particular plan to accomplish that result.

In this case, the proposed action by the City of Emporia will result in a racially unitary system of public education in the City in which approximately 52% of the school population will be Negro and 48% will be white. All students in the elementary grades will attend one school and all students in the high school grades will attend another school. The County system, which will also be racially unitary, will contain approximately 72% Negro students and 28% white students. The ratio of the combined system is approximately 66% Negro and 34% white. The shift in racial balance resulting from the proposed separation of Emporia from the County system denies to no one any constitutional right to which he is entitled. Further, no other result of the proposed separation constitutes the violation of any constitutional right of petitioners.

The proposed action of the City will stand any constitutional test to which it is fairly subjected whether that test be the one announced in the opinion of the Fourth Circuit, the one proposed by Judge Winter in his dissent to the opinion of the Fourth Circuit, or the one proposed by Judge Sobeloff in his dissent to the opinion of the Fourth Circuit in *United States* v. *Scotland Neck City Board of Education, supra.*

Therefore, the City of Emporia should not be restrained from exercising the powers and fulfilling the duties imposed upon it by the Constitution and laws of Virginia.

ARGUMENT

I

The Law of Virginia Vests the Power and the Duty Upon the City of Emporia to Operate and Maintain a Public School System

A.

Counties And Cities Of Virginia Are Independent Of Each Other

In *City of Richmond* v. *County Board,* 199 Va. 679 (1958) at 684, the Supreme Court of Virginia stated:

> In Virginia, counties and cities are independent of each other politically, governmentally and geographically. Each of them, within its particular boundaries, is a co-equal political subdivision agency of the State.

In *Murray* v. *Roanoke,* 192 Va. 321 (1951) at 324, the Virginia Court held:

> In Virginia, counties and cities are separate and distinct legal entities. Each is a subordinate agency of the State government, and each is invested by the legisla-

> ture with subordinate powers of legislation and administration relative to local affairs in a prescribed area. Citizens of the counties have no voice in the enactment of city ordinances, and conversely citizens of cities have no say in the enactment of county ordinances.

That this has been the law historically in Virginia is demonstrated by *Supervisors* v. *Saltville Land Co.*, 99 Va. 640 (1901).

This principle is applicable to a city that became such under the provisions of the law providing for the transition of towns to cities. In *Colonial Heights* v. *Chesterfield*, 196 Va. 155 (1954), the Supreme Court of Virginia held at 167:

> The town, upon becoming a city, separates from a political subdivision of which it was a part and becomes an independent political subdivision, except as to certain joint services specified in Code, § 15.104 [now § 15.1-1005].

Schools are not listed among the services specified in § 15.1-1005—that section is limited to the sharing of the circuit court, commonwealth's attorney, clerk and sheriff.

B.

Emporia Became A City Pursuant To Long Existing State Law

The present Code of Virginia provides that a town upon attaining a population of 5,000 may elect to become a city of the second class by following the procedure set forth in the Code. Title 15.1, ch. 22, *Va. Code Ann.* 1950, as amended. The law has been substantially the same since at least 1892. *Acts of the Assembly*, 1891-1892, ch. 595, at 934.

Thus it is clear that the provisions under which the Town of Emporia acted to become a city have long been a part of

the law of Virginia and were not enacted in any way as the result of the school desegregation suits or for any other racial reason.

C.

Cities In Virginia Have The Right And Duty To Operate And Maintain Own School Systems

On July 31, 1971, a rather extensive revision of the Constitution of Virginia became effective. Conforming revisions to the statutes of Virginia likewise became effective on that same date. The argument that follows in this section is applicable under the constitution and statutes both before and after the revision.

The Constitution of Virginia has, since 1928, vested the supervision of county schools in the county school boards and the supervision of city schools in the city school boards. Section 133 of the Constitution of Virginia (RA 1), which was in effect at the time this case was tried,[16] provides, in part, as follows:

> The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law.

Since at least 1919 the Code of Virginia has affirmatively required the city school boards to establish and maintain a

---

[16] Pertinent portions of the Constitution as revised are set forth at RA 2.

Many of the sections of the Code of Virginia which are set out in the appendix to the Brief for Petitioners have been amended or repealed. The sections, as amended, are set forth at RA 2, 3 and 7.

Under the law of Virginia at the time this case was tried and at the present time, it was and is not possible to have a single school board for a county and a city without the consent of both and of the State Board.

system of schools in cities. Section 22-93, *Va. Code Ann.*, 1950, as amended (RA 3), provides:

> The city school board of every city shall establish and maintain therein a general system of public free schools in accordance with the requirements of the Constitution and the general educational policy of the Commonwealth.

This language was also contained in the Code of 1919, § 786.

Section 22-97, *Va. Code Ann.*, 1950, as amended (RA 3, *et seq.*), enumerates the powers and duties of the city school boards.

Thus, the law in Virginia for many years has not only permitted but required city school boards to establish and maintain city schools.

The petitioners have recognized that the local school boards are required to "establish, maintain, control and supervise an efficient system of public free schools" in the political subdivisions of the State. See paragraph 7 of the Complaint filed on March 12, 1965 (5a).

The Supreme Court of Virginia has spoken directly to the duty of a city to maintain its own school system after a transition. In *School Board* v. *School Board*, 197 Va. 845 (1956), dealing with the transition of the Town of Covington to a city, the court stated at 847:

> As a town, Covington was a part of Alleghany County whose public schools were operated by the County School Board. When Covington became a city it ceased to be a part of the county, became a completely independent governmental subdivision, *and was required by law to maintain its own public school system* (emphasis supplied).

The evidence shows that under the contract arrangement between Greensville County and the City of Emporia, which was in existence when the case was tried in the District Court, the School Board of the City of Emporia was not exercising or fulfilling any of these powers and duties (158a, 159a, 242a).

If the City is further restrained from operating its own system, an intolerable situation will be perpetuated. Children of City residents will be required to attend a school system over which the City has *absolutely no control*. The City will have no right to participate in the selection of the members of the County School Board and thus will have no voice in the quality of the schools that are provided. It will have no right to participate in the selection of the governing body of the County and thus will have no voice in the amount of money appropriated for school purposes.

On the other hand, the County will be required to continue educating the City's children. Absent agreement between the City and County, there is no definitive provision for establishing the amount that City should pay to the County for this service. If no such agreement could be reached—and with the situation as it exists, it is doubtful that it could—the question would inevitably be presented to the courts. Any order requiring the City to pay a certain amount to the County would, in effect, be an order requiring the governing body of the City to levy taxes and appropriate a fixed sum to pay to the County for the operation of its school system—a school system over which the City has no control whatsoever.

On page 45 of their brief, in footnote 26, petitioners suggest a solution: they suggest that the District Court "could modify the requirements of state law concerning representation." They do not elaborate on this plan. Do they envision

court-ordered representation of the City on the school board only? This would accomplish nothing since the power of the purse lies solely with the governing body of the County. Or do they suggest court-ordered representation of the City on the governing body of the County? The statement of the question alone illustrates the problems—constitutional, statutory and practical—which would inevitably follow.

If petitioners' suggestion were followed to its logical conclusion, district courts would find themselves making legislative determinations involving every level of state government. They would be required to determine the manner in which local government in Virginia must be structured, the manner of providing representation on the governing bodies and school boards of the local units of government, and the manner in which the taxing powers of those units must be exercised.

We do not believe that the operation by Emporia of its own school system as provided for by Virginia law violates any constitutional right of petitioners. And we submit that the fact that the structure of local government in Virginia was established under long-existing constitutional and statutory provisions is a consideration upon which this Court should focus in deciding this question.

II

Operation by the City of Its Own School System Would Violate no Constitutional Rights of Petitioners

A.

Petitioners' Rights

Petitioners' rights in this case are grounded upon the mandate contained in the Fourteenth Amendment to the Constitution of the United States that:

> No state . . . shall deny any person within its jurisdiction the equal protection of the laws.

Between the date of the decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown* I), and the present time, literally hundreds of cases have been decided dealing with the scope of this constitutional mandate as applied to the public school systems of the several states. Nevertheless, it is well to focus on the language of the basic provision of the Constitution which establishes the rights of the petitioners on the one hand and the duties of the respondents on the other.

In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968), and in *Alexander* v. *Holmes County Board of Educ.*, 396 U.S. 19, (1969), this Court has made its most recent pronouncements with respect to the substantive constitutional rights of Negro children and the corresponding duties of local school boards.

In *Green*, the Court stated that it had held dual systems unconstitutional in *Brown* I and that the school boards were "required by *Brown* II 'to effectuate a transition to a racially non-discriminatory school system'." 391 U.S. at 435.

The Court then said:

> *[T]he transition to a unitary, non-racial system of public education was and is the ultimate end to be brought about* . . . (emphasis supplied).

391 U.S. at 436.

The Court continued:

> School boards . . . were . . . charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch . . .

> The constitutional rights of Negro children articulated in *Brown I* permit no less than this . . .

391 U.S. at 437, 438.

In *Holmes,* this Court instructed the Court of Appeals to declare:

> that each of the school districts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color.

396 U.S. at 21.

In *Swann,* this Court did not expand its previous definition of the rights of Negro children but rather dealt with the duties of school authorities and the powers of district courts to assure that such rights were enjoyed. The objective of the Court was "to see that school authorities exclude no pupils of a racial minority from any school, directly or indirectly, on account of race." *Swann,* 402 U.S. at 23. (It is to be noted that in the instant case, petitioners are in the racial majority.)

Therefore, based upon the foregoing decisions, the petitioners have the constitutional right to attend a unitary, nonracial school system, and the local school boards have the affirmative duty to provide such a system. It is submitted that while the petitioners can expect no less, they can demand no more. Such a system is "the ultimate end," (*Green,* 391 U.S. at 436) to be attained and, if attained, provides the rights to which petitioners are entitled and fulfills the duties for which the respondents are responsible.

This Court has also held that Negro children have no constitutional right to any particular plan to accomplish the

ultimate end of a racially unitary system. If the plan of the local school authorities has been adopted in good faith and "promises realistically to work *now*," then it provides effective relief. *Green,* 391 U.S. at 439. And school authorities "have broad power to formulate and implement educational policy" *Swann,* 402 U.S. at 16.

Of course, the right to a unitary, nonracial school system cannot be nullified "through evasive schemes for segregation whether attempted 'ingeniously or ingenuously'." *Cooper* v. *Aaron,* 358 U.S. 1 (1958) at 17. By the same token, the rights and duties of local school authorities to operate and maintain school systems as provided for by the constitution and laws of the state cannot be nullified by insistence upon a particular method of achieving a unitary system.

It is only when the violation of a constitutional right has been shown that the remedial powers of the courts may be exercised. In *Swann,* this Court stated:

> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

402 U.S. at 16.

Here, the City has not defaulted and its proposed action will not violate any of petitioners' constitutional rights. Thus it is not necessary, nor is it proper, to consider the scope of the district court's remedial power. Where there has been no denial of a federally protected right, there is no remedial power to be exercised.

B.

Proposed Action Of The City

The School Board of the City of Emporia has adopted a plan pursuant to which it will operate a racially unitary school system if permitted so to do by the courts. This plan is set forth in footnote 12 on page 14 of this brief and on page 224a of the Appendix.

The evidence shows that such a system operated by the City will have approximately 48 percent white students and 52 percent Negro students (304a).

The uncontradicted evidence showed that the City has taken steps to plan a school system of excellence that would provide incentives for all its children to obtain an education in a truly unitary system. The District Court so found (297a). It was envisioned that this system would serve as an example of what can be done by school officials dedicated to making a unitary system work—not just in name and numbers, but in actual fact.

The School Board engaged the services of a well-known educator who assisted it in making preliminary plans for the type of program that would be required to meet the educational and social challenges of a system that has a 50-50 racial mix and to hold the children who might otherwise drop out of the system before completing their education (202a, *et seq.* espec. 212a). An estimated budget for the operation of such a system was prepared and approved by the unanimous vote of the School Board (200a). Further, the City Council agreed to include the necessary funds to finance such a system in the next budget (287a). Of course, the actions of the School Board and Council were necessarily conditioned upon the dissolution of the injunction entered by the District Court.

Every step that could practicably be taken to plan such a system consistent with the restraints imposed by the District Court was taken. The plans were more than mere abstract expressions of individuals relating to goals to be sought. Formal approval to the extent now possible of workable plans and the estimated budget by the respective Boards are a matter of record. If those plans violate no constitutional rights of petitioners, then the Council and School Board of the City of Emporia should be permitted to proceed to put them into effect.

C.

Petitioners' Rights Will Not Be Violated By The Proposed Action Of The City

It is obvious that the separate systems—City and County—will each be racially unitary in law and in fact. No student in the City and no student in the County—whether of the racial majority (Negro) or minority (white)—will be excluded from any school on account of race. The District Court held that it "was satisfied that the City, if permitted will operate its own system on a unitary basis" (307a). It previously entered an order that assures such a system will be operated in Greensville County (54a) regardless of the outcome of this case.

In footnote 21, on pages 32 and 33 of their brief, petitioners complain that under the City's plan the traditional racial identities of the schools would be maintained. This is just not true. For two and one-half years, the County system has been operated under the "pairing" plan approved by the District Court on June 25, 1969 and presumably it would continue to operate under such a plan. Under the City's proposal, each of the two schools it will operate will be fully integrated—one with a slight majority of Negro students,

the other with a slight majority of white students (316a). And one of those schools will be named the R. R. Moton Elementary School (225a).

Therefore, it is only if the separation itself, which came about as an automatic and incidental result of the town's transition to city status, deprives petitioners of their constitutional rights that the City should be prohibited from operating its own system as every other city in Virginia is permitted to do.

Petitioners base their argument and their case on an assumption. They *assume* the deprivation of a constitutional right. They do not ever attempt to point out the constitutional right they claim would be violated. Their argument speaks only to the remedial powers of the District Court which, as we have previously noted, can only be applied after a violation of a constitutional right has been shown. *Swann, supra*, 402 U.S. at 16. Thus, petitioners attempt to pull themselves up by their own bootstraps—they argue the abstract principles with respect to remedy without ever establishing a violation.

To put the issue here involved into perspective it is necessary to examine the reasoning of the District Court and of the dissenting judge (Judge Winter) on the Court of Appeals in holding that the City should be restrained. Only in that way can the applicable law be related to the facts in this argument. In their Statement, petitioners set forth the following "difficulties" which the District Court found would arise upon separation (PB 21, 22):

1. substantial shift in racial balance,
2. a city high school of less than optimum size,
3. isolation of rural county students from exposure to urban society,
4. disruption of teaching staff, and

5. withdrawal of city leadership from the county's educational program.

Further, they set forth the factors mentioned by Judge Winter which would make the separate system plan "less effective" than the District Court order. In summary, these factors were stated to be (PB 27):

1. delay which would be occasioned by adoption of new plans,
2. substantial change in racial proportions, and
3. the effect on county black students of the excision from their system of a significant part of the white population.

With the exception of the so-called "substantial shift" in racial balance, all of the aforementioned "difficulties" and factors would be present even if the racial balance in the separate systems had remained precisely the same as it was before separation. And almost all of them would be present had the systems historically been separate.

We submit that none of such difficulties or factors—even if they in fact exist, which we deny—constitutes a violation of any constitutional right of petitioners. We again point out that the District Court was not convinced that any adverse effects *would* result from the separation. It stated that even though the City would operate systems with "superior quality" (297a) on a "unitary basis" (307a), that

> [But] this does not exclude the *possibility* that the act of division itself *might* have foreseeable consequences that this Court ought not to permit" (emphasis supplied) (307a).

And:

> This Court is most concerned about the *possible* adverse impact of secession on the effort, under Court di-

rection, to provide a unitary system to the entire class of plaintiffs" (emphasis supplied) (308a).

It is clear that the primary factor upon which the District Court based its decision, upon which Judge Winter based his dissent and upon which petitioners base their case is the shift in racial balance that will occur. We will address that issue now.

Shift in racial balance

The facts with respect to racial balance are:

Combined system	66% black; 34% white
Separate systems	
County	72% black; 28% white
City	52% black; 48% white

These are the facts found by the District Court and adopted by the Court of Appeals (304a, 316a). Whether or not such a shift of such ratios constitutes the violation of a constitutional right is not a question of fact—rather it is a conclusion drawn from the facts. It is certainly within the powers of courts of appeals to reverse district courts on such a matter. *Glassman Construction Company* v. *United States,* 421 F. 2d 212 (4th Cir. 1970). Actually, the District Court did not ever specifically hold that the shift did constitute a violation of constitutional rights.

In any event, we submit that a six percent increase in Negro enrollment and a six percent decrease in white enrollment cannot reasonably be deemed a "substantial shift." Such a minor change of proportions could result in any year for a variety of reasons and could not be deemed to alter the character of the County system. Before and after such a shift, the County system would be fully integrated with an approximate two to one Negro to white ratio.

We submit that there is no evidence in the record to indicate that such a slight shift would actually result in any harm to county students. However, assuming *arguendo,* that harm would result from this slight change in the racial balance, per se, is it the type of harm against which the Constitution of the United States provides protection? The City submits that it is not. It does not result from the deprivation by the City of any constitutional rights of the petitioners.

In *Swann,* 402 U.S. at 24, this Court made it crystal clear that there is no requirement "as a matter of substantive constitutional right, [to] any particular degree of racial balance or mixing." It continued:

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole

402 U.S. at 24.

While local school authorities could require such ratios, federal courts do not have the power to do so absent a finding of constitutional violation. *Swann,* 402 U.S. at 16.

Analysis of the cases cited by petitioners discloses that they are readily distinguishable from the Fourth Circuit's decision in this case. It is probable that had those cases been before the Fourth Circuit, its decision would have been the same as in the cited cases.

In *Lee* v. *Macon County Bd. of Educ.,* No. 30154 (5th Cir., June 29, 1971) (SA la), Oxford City, Alabama, attempted to establish its own school system independent of Calhoun County of which it is a part. Apparently, Oxford had been a city since at least 1899 (SA 4a) but had been a part of the county school system since 1932. Though Oxford was a city, it is assumed that it was not completely inde-

pendent of the county since Virginia is the only state in the United States in which the unique structure of independent cities uniformly exists.[17]

More importantly, however, the Oxford system would have contained only 157 Negro students out of a total enrollment of 2,441 (SA 10a, fn. 10). At the same time, approximately 45% of all the black students in the county system would attend all black or virtually all black schools (SA 13a). Thus, the *effect* of the Oxford plan is to perpetuate segregation.

In *Stout* v. *Jefferson County Bd. of Educ.*, 448 F2d 403 (5th Cir. 1971), also arising from Alabama, it was held that

> "Where the formulation of splinter school districts * * * *have the effect* of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann* v. *Charlotte-Mecklenburg, supra,* recognize their creation" (emphasis supplied).

448 F2d at 404.

Involved in that case was the city of Pleasant Grove in the schools of which were *no* Negroes.[18] Again the *effect* of the Pleasant Grove system was to perpetuate segregation.

---

[17] C. Bain, *"A Body Incorporate"—The Evolution of City-County Separation in Virginia* ix, 23, 27, 35 (1967); C. Adrian, *State and Local Governments,* 249 (2d ed. 1967).

[18] Support for this statement comes from the following quotation in *Stout* v. *Jefferson County Bd. of Educ.*, CA No. 65-396 (N.D. Ala., July 30, 1970), which is unreported:

> To date, the Pleasant Grove System has remained all white, but students attending the Pleasant Grove school are attending the school nearest their residence whether Pleasant Grove remains separate or a part of the County System. To date, they have no black faculty members, but have offered employment to black teachers and are seeking to recruit some teacher members of that race. The system is open and available for all members of all races residing within the City of Pleasant Grove without discrimination. There are no black citizens within the city.

In *Burleson* v. *County Bd. of Election Com'rs.*, 308 F. Supp. 352 (E.D. Ark. 1970), *affd per curiam* 432 F. 2d 1356 (8th Cir. 1970), the question was whether the Hardin Area of the Dollarway School District of Jefferson County, Arkansas, would be permitted to secede from that particular district and establish a new district *within* the same county. Apparently, in addition to the county board of education, each school district had its own "board of directors." For all purposes other than schools, it is again assumed that the Hardin Area would remain a part of Jefferson County.

In the *Burleson* case the district court found:

> The population of the Area is almost exclusively white. In the fall of 1969 270 students residing in the Area were in attendance in the schools of the District, and only 5 of those students were Negroes.

308 F. Supp. at 353.

The Court went on to hold that under the "existing circumstances" the proposed secession would be enjoined. 308 F. Supp. at 358.

In *Aytch* v. *Mitchell,* 320 F. Supp. 1372 (E.D. Ark. 1971), a suburban area was seeking a division of one school district into two separate districts. Had this been permitted the suburban district would have had a racial ratio of 94% white to 6% black and the other district, a ratio of 96% black to 4% white. Obviously, no valid comparison can be drawn between *Aytch* and this case.

Petitioners cite *Jenkins* v. *Township of Morris School Dist.*, ___ A. 2d ___ (N.J. 1971) (SA 25a) for the proposition that the Commissioner of Education for the state had the power to cause district lines to be crossed. This is far different from a decision that the constitutional rights of Negro students require such a result.

Haney v. *County Bd. of Educ. of Sevier County,* 410 F. 2d 920 (8th Cir. 1969) involved two school districts within *one* county that were formed at a time when segregation was required by state law. The Lockesburg district contained white children only. The Sevier district, which consisted of two noncontiguous, irregularly shaped areas each of which was almost entirely surrounded by the Lockesburg district, contained Negro children only. The court there held as a matter of law that the school district lines were created to reflect racial separation—gerrymandering. 410 F. 2d at 926.

Each case cited by the petitioners in which the court has prohibited separation involved a situation in which the *effect* of such separation would have been to avoid a racially unitary school system as a matter of fact. Under the facts of those cases, we suggest that the Fourth Circuit would likewise have prohibited the separation.

Not cited by petitioners is *Spencer* v. *Kugler,* 326 F. Supp. 1235 (D.C. N.J., May 13, 1971) which was decided by a three-judge district court. The case is now on appeal to this Court and bears Docket No. 71-519. That case involves the duty of school authorities to redraw school district lines in order to correct racial imbalance. In that case, as in the instant case, no black pupil is segregated from any white pupil, blacks in the school district predominate over white (326 F. Supp. at 1239), school boundaries were prescribed by the legislature in conformity with municipal boundaries and considerations of race were not involved in the drawing of the lines. 326 F. Supp. at 1240. Further, plaintiffs in that case, as in this, do not disclose the particulars of the constitutional violations which they assume. 326 F. Supp. at 1240.

The Court held that the school system was unitary in nature and any imbalance within a district results from an

imbalance in the population of that municipality. 326 F. Supp. at 1240. After holding that *Brown* v. *Board of Education, supra,* "never required more than a unitary school system," the Court dismissed the complaint. 326 F. Supp. at 1241. The Court pointed out that its opinion was drafted prior to the *Swann* decision, but that it considered *Swann* to be a favorable appellate review of its views. 326 F. Supp. at 1241.

Factors other than shift in racial balance

None of the other factors which petitioners set forth as having been considered by the District Court and by Judge Winter in his dissent can possibly give rise to a constitutional violation. They are factors which a school board should consider in the administration of its system. They are not constitutional problems which should be weighed and determined by the federal judiciary. *Deal* v. *Cincinnati Board of Educ.*, 369 F. 2d 55 at 59, 65 (6th Cir. 1966), *cert. denied* 389 U.S. 847 (1967). If the racial balance in the City and the County would have been precisely the same before and after separation, we suggest that a case based upon the other factors would not have ever been filed.

The District Court mentioned as difficulties that "the smaller city system would not allow a high school of optimum size" and that "division of the existing system would cut off county pupils from exposure to a somewhat more urban society" (306a). It also found that many of the teachers live in the City and that a separate system "would undoubtedly have some effect on the teaching staffs" even though the City represented it would not seek to hire such teachers (307a). Petitioners state that the District Court also found the "withdrawal of city leadership from the

county's educational program" to be a difficulty (PB 22). We cannot locate such a finding unless it be the statement that the desire and ability of City leaders will be an important facet in the successful operation of any court-ordered plan (306a).

We submit that the size of the City high school; the questionable conclusion that County students would be cut off from a somewhat more urban society;[19] some unspecified effect on teaching staffs; and loss of leadership, which the City, in fact, is precluded from providing, are not factors which give rise to constitutional rights. If they were, then *all* residents of a state would be constitutionally entitled to optimum size schools, to urban exposure, and to the leadership which might be derived from adjacent political subdivisions.

Judge Winter added two other reasons: the delay which would have been occasioned by the adoption of the new plans (339a) and the "adverse psychological effects on the black children in the county" (340a). If the delay which Judge Winter believed would occur referred to the situation in August 1969, it, of course, would not have been a factor in December 1969 since the City did not plan to begin operation of its own system until September 1970 (200a). Further, the plan submitted by the City (224a) was very simple and would not have caused delay in implementation. Lastly, if the City has the right to operate its own system, any slight delay that possibly might occur would not be a constitutional obstacle.

There was absolutely no evidence to support Judge Winter's conclusion that the shift in racial balance of 6% would have an "adverse psychological" effect on the Negro students in the County with any resultant effect on educational

[19] It is to be noted that the District Court did not find this to be detrimental.

achievement. In fact, Dr. Tracey testified that he spent some time in ascertaining whether any studies were available on that question and that no such study had been made (281a):

D.

Proposed Action of City Meets Any Constitutional Test To Which It May Fairly Be Subjected

Petitioners assert that the opinion of the Fourth Circuit announces a new rule for school desegregation cases, which, according to petitioners, involves the determination of the "primary *motive*" of those proposing a change in school district organization (PB 37). Only once in that opinion is "motivation" mentioned and that was in connection with the decision of Emporia to seek city status (314a). Even there, the Court found the motivation to have been to correct an unfair allocation of tax revenues and *not* to prevent or diminish integration. The Fourth Circuit did examine the "purpose" of the City in attempting to operate its separate system and it must be assumed that it chose the word "purpose" advisedly. Likewise, it is assumed that the petitioners elected to use the word "motive" advisedly, in stating what the Court of Appeals said, rather than using that Court's word. Be that as it may, in our view, as we will later explain, it makes little difference in this case which word is used.

Petitioners argue that the "effect" of the proposed action should be controlling rather than the motive behind that action. We agree. And so did the Court of Appeals. Petitioners, in their argument, ignore completely that the Fourth

Circuit was vitally concerned with the effect or result of the separation.[20]

The effect or result of the proposed separation was the first matter examined by the Court. Had it found that the effect of separation would be to perpetuate segregation or to result in resegregation, its inquiry would have ended and the District Court would have been affirmed. However, when it specifically found that the proposed separation would not have that effect, the Fourth Circuit held that further inquiry was necessary to determine the dominant or primary "purpose" of the proposed action. If the purpose was to "further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation," it held that "the federal courts should not interfere" (313a). If, however, the primary purpose was to "retain as much of separation of the races as possible" the "affirmative constitutional duty to end state supported school segregation" has been violated (313a).

The test applied by the Fourth Circuit is more generous to petitioners than any test which they suggest. It cannot be disputed that the effect of establishing the City's School System will be that Greensville County and the City of Emporia each will operate racially "unitary school systems with-

---

[20] On page 25 of their brief in the Statement section, petitioners write:

> In general, therefore, the Court holds that the permissibility of creating new districts from old ones depends upon whether the "primary purpose . . . is to retain as much of separation of the races as is possible" (313a). Where the *result* justifies an inference of purpose, that is the end of the matter. Where it does not, the courts are to look to other evidence in forming their judgment of the "primary purpose" for establishing new districts (emphasis supplied).

Thereafter, they overlook their own statement with respect to the basis of the decision of the Fourth Circuit and proceed as if "motive" were the sole test applied by that Court.

in which no person is to be effectively excluded from any school because of race or color," *Holmes,* 396 U.S. at 20, and from which "school authorities exclude no pupil of a racial minority [or majority] from any school, directly or indirectly, on account of race." *Swann,* 402 U.S. at 23. In both systems, Negro children will be in the majority just as they were in the combined system. In the County that majority will be increased by only 6 percent as a result of the separation (316a). There is no evidence of any resultant harm to the petitioners who reside in the County—certainly none of a constitutional nature. On the other hand, the Negro children who live in the City—for whom those prosecuting this litigation appear to have no regard—will not only be able to attend a racially unitary system but also a system in which a superior quality educational program geared to solve the problems of integration will be provided. The District Court so found (297a, 306a, 307a).

Thus, we submit that the Fourth Circuit did consider "effect" to be of vital importance. It considered "effect" as the primary test in determining the purpose of the separation. And purpose is a proper—perhaps necessary—inquiry in equal protection cases which involve whether a challenged classification is unconstitutional. (It is on this point that the distinction between purpose and motive is important. The former is an objective determination; the latter, a subjective one.) See *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065 (1969) at 1091.

The Fourth Circuit went *beyond* "effect" in its determination of purpose:

> Not only does the *effect* of separation not demonstrate that the primary purpose of the separation was to perpetuate segregation, but there is strong evidence to the contrary. Indeed, the district court found that

> Emporia officials had other purposes in mind (emphasis supplied) (316a).

The Court then reviewed the findings of the District Court that we have set out previously in this brief.

Having decided that no discriminatory effect or purpose existed or would result, which decision was based upon the District Court's findings of fact, the Fourth Circuit held that the injunction would sacrifice legitimate and benign educational improvement and should be dissolved (318a).

In the lone dissent to the opinion of the Fourth Circuit, Judge Winter expressed the opinion that the standard to be applied was established in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) (336a). The proposed plan of the City, we submit, meets that standard.

It was in *Green* that this Court said that "a unitary, nonracial system of public education was and is the ultimate end to be brought about. . . ." 391 U.S. at 436.

It was in *Green* that this Court said that there is "no universal answer" to the problems of desegregation and that there is "no one plan that will do the job." 391 U.S. at 439.

It is only when the proposed plan is "less effective" than another plan that "a heavy burden" is placed upon a school board to explain its preference. *Green,* 391 U.S. at 439.

First, we submit that the proposed plan is not less effective than the one urged by petitioners. On the contrary, it is more effective. Second, even if it were less effective, the City has carried the heavy burden of showing why it is preferable.

Judge Winter attaches crucial significance to the fact that the percentage of white students in the City would be substantially greater than it would have been in the combined system. He said:

> Within the entire county, there are 3,759 students in a racial ratio of 34.1% white and 65.9% black. Within

> the city there are 1,123 students, 48.3% of whom are white and 51.7% are black. If the city is permitted to establish its own school system, the racial ratio in the remainder of the county will change to 27.8% white and 72.2% black. To me the crucial element in this shift is not that the 48.3%-51.7% white to black ratio in the town *does not constitute the town a white island in an otherwise heavily black county and that a shift of 6% in the percentage of black students remaining in the county is not unacceptably large.* Whenever a school area in which racial separation has been a historical fact is subdivided, one must compare the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation. A substantial shift in any comparable balances should be cause for deep concern. In this case the white racial percentage in the new unit will increase from 27.8% to 48.3%.[21] To allow the creation of a substantially whiter haven in the midst of a small and heavily black area is a step backward in the integration process (emphasis supplied) (339a, 340a).

Thus, Judge Winter agrees with the majority that Emporia would not be a white island and that the 6% shift in the percentage of black students remaining in the County is not unacceptably large. That being so, what possible injustice would result from the fact that the percentage of white students in the City system would be greater than that percentage would have been in the combined system—in either case, white students will be in the racial minority. The only logical explanation seems to be that Judge Winter believes that a particular racial balance is required by the Con-

---

[21] Judge Winter apparently misread the figures. Actually, the white racial percentage would increase from 34% in the combined unit to 48% in the City unit.

stitution. This Court has made it clear that this is not the law. *Swann,* 402 U.S. at 24.

The standards proposed by Judge Sobeloff in *United States* v. *Scotland Neck City Board of Education,* 442 F. 2d 575 (4th Cir. 1971) are preferred by petitioners (PB 43). He suggests a "compelling and overriding state interest" test (322a, *et seq.*).

He states it as follows:

> If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interest is demonstrated (322a).

Since Judge Sobeloff did not participate in the *Emporia* case, we of course do not know how he would have applied that standard in it. In *Scotland Neck,* he stated that the effect of the new school district was to "create a sanctuary for white students" (334a) and was therefore discriminatory.

We submit that the proposed action by the City of Emporia would have no such effect. The City, as Judge Winter agreed (340a), will by no means be a "sanctuary" for white students for they will be in the racial minority. Even if the fact that white students will constitute 48% of the City system, as compared to 34% of the total system, would have a racially discriminatory effect, which we deny, we submit that it should be permitted under Judge Sobeloff's own test. The objective of the City to provide a superior quality, racially unitary school system of its own, as every other city in the state is permitted to do, constitutes a compelling and overriding legitimate state interest. The majority in the *Emporia* case so held:

> We think the district court's injunction * * * was improvidently entered and unnecessarily sacrifices legitimate and benign educational improvement (318a).

Petitioners have made it clear that they do not believe "motive" to be controlling. As heretofore stated, we agree. We have pointed out that the majority did not base its decision upon motive. Judge Winter alone would have no objection to consideration of motive.[22]

This Court has recently stated that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Palmer* v. *Thompson,* 403 U.S. 217, 29 L. Ed. 2d 438 (1971) at 444.

It is true, however, that "the process of finding purpose and that of finding motive may overlap"[23] and we suggest that the record in this case indicates that the *purpose* of the proposed action by Emporia is identical with the motives of the officials who made the decision. Certainly, "good faith," while not determinative, is a factor to be considered. *Green,* 291 U.S. at 439; *Brown* v. *Board of Educ.,* 349 U.S.

---

[22] Judge Winter said:

> In an area in which historically there was a dual system of schools and at best grudging compliance with *Brown,* we cannot be too careful to search out and to quash devices, artifices and techniques furthered to avoid and to postpone full compliance with *Brown.* We must be assiduous in detecting racial bias masking under the guise of quality education or any other benevolent purpose. Especially must we be alert to ferret out the establishment of a white haven, or a relatively white haven, in an area in which the transition from racially identifiable schools to a unitary system has proceeded slowly and largely unwillingly, where its purpose is at least in part to be a white haven. Once a unitary system has been established and accepted, greater latitude in redefinition of school districts may then be permitted (338a).

[23] *Developments in the Law—Equal Protection, supra,* 82 Harv. L. Rev. at 1092.

294 (1955) at 299 (*Brown* II). And whether the determination of "good faith" is one of purpose or motive, the record here establishes the good faith of Emporia. The decision of the Fourth Circuit, which was based upon the District Court's findings of fact, so holds.

There is no evidence in the record which would indicate that the motive of the City officials was to perpetuate segregation or to minimize integration, The only consideration given to race was the realization that special effort would be required to make a unitary system actually work (307a). Emporia then determined that it wanted to and would provide that effort. Therefore, we submit that the "affirmative duty to desegregate has been accomplished" and that "racial discrimination through official action has been eliminated from the system." *Swann,* 402 U.S. at 32. Since there has been no

> "showing that the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

Swann, 402 U.S. at 32.

CONCLUSION

The District Court enjoined the City from operating its own school system. In so doing, it disregarded the beneficial effects that would inure to the children—Negro and white—of the City. If the injunction were reinstated, excellence of education for the City children would be sacrificed. Emporia, an independent city, would be denied the opportunity to establish a quality educational program in a unitary system in order that a particular racial balance in the system of

an adjoining independent county would not be disturbed. The Constitution does not require this. So long as petitioners may attend a racially unitary system, their constitutional rights have been fulfilled and the constitutional duties of the School Board have been performed.

For the reasons herein stated, the City respectfully submits that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

D. Dortch Warriner
314 South Main Street
Emporia, Virginia 23847

John F. Kay, Jr.
1200 Ross Building
Post Office Box 1122
Richmond, Virginia 23208

Attorneys for Respondents